IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JACK S. CHESTER	**PLAINTIFF**
V.	**CASE NO. 3:13-CV-00111-CWR-LRA**
DIRECTV, LLC	**DEFENDANT**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant's motion for summary judgment. Docket No. 43. The plaintiff responded to the motion, Docket No. 48, and defendant filed a reply, Docket No. 51. After considering the parties' briefs and applicable law, the Court finds that defendant's motion should be granted.

I. Factual and Procedural History

Plaintiff, Jack Chester, was an employee of defendant from October 2008 until his termination in September 2012.[1] In 2008, plaintiff was promoted to field supervisor where he was responsible for supervising a team of installers and technicians and ensuring they maintain specific target numbers. In April 2011, defendant conducted its annual site survey. Defendant met with the supervisors, technicians and human resources representatives because the Jackson office scored below defendant's other sites.

Following this 2011 site visit, plaintiff had a meeting with Human Resources to express concerns about the office's management. Specifically, Chester stated he did not have supervisory authority because other employees gave him orders and that office staff pulled and moved job

[1] From 2003 to 2008, plaintiff worked for Bruister and Associates, which was acquired by defendant in 2008. Bruister was a contractor of defendant that provided installation services. As a Bruister employee, plaintiff worked as an installer, service technician, and QA technician.

orders without consulting a supervisor. Additionally, the warehouse manager gave order to both the supervisors and technicians.

In order to assess customer satisfaction, defendant uses specific performance metrics. In 2012, there were concerns regarding Chester's ability to manage his team's customer service scores. One of the key metrics is referred to as Service on Service (SOS), which refers to repeat service following an installation or repair within a given timeframe. The SOS is measured in 30, 60, and 90 day increments. Defendant sets the following SOS targets: not above 1% for SOS 30; not above 1.5% for SOS 60; and not above 2% for SOS 90.

Chester's team's numbers exceeded those permitted by defendant and he received a disciplinary write-up in March 2012. In addition to his poor SOS numbers, plaintiff's team also failed to meet the standards for completion rate, new install completion rate, and quality assurance percentages.

In April 2012, there was another site survey and Tim Cole, the Regional Vice President, came to meet with some of the technicians. He also met with the four field supervisors and plaintiff's direct supervisor, the branch manager. Cole told the supervisors that the technicians were not satisfied and Cole had the authority to fire all of them. Cole stated he would give the field supervisors 30 days to make improvements and he expected the supervisors to be in the field assisting the technicians as well as pulling report and working to improve their numbers.

On July 21, 2012, plaintiff wrote up an office administrator following a disagreement with her regarding equipment needed for a repair. Two days later, Chester was summoned to a conference call with the branch manager, Lee Branning, Regional Director of Operations, and Mike McKelvaine from Human Resources. Plaintiff was told he could not write up the office administrator and received a write up because his correspondence was deemed unprofessional.

This disciplinary action was contained in a write up that also included documentation of plaintiff's ongoing failure to meet the performance standards set by defendant. Docket No. 43-5. Defendant indicated that this was plaintiff's final warning regarding his team's failure to meet the required standards. *Id.* His team's numbers were as follows: SOS30 was 2.6% instead of below 1%; SOS60 was 4.7%, exceeding the target of 1.5%; and SOS90 was 6.6% instead of 2% or below.

During the fall 2012, plaintiff along with the other field supervisors met with Lee Branning, Chuck Tomlinson, and Mike McKelvaine to again discuss their team's performance and productivity.[2] Each field supervisor met individually with the upper management team. During this meeting, plaintiff was questioned about the performance of his individual team members as well as his interaction with each of his team members. Defendant contends that plaintiff answered incorrectly regarding his best and worst performers on his team. Chester maintains he answered these questions accurately based on his understanding of productivity and relevant statistics. Defendant found plaintiff's lack of knowledge of his team along with the worsening performance metrics and the previous disciplinary action sufficient to warrant termination.

Following his discharge, plaintiff filed a complaint with the EEOC and it issued a Notice of Right to Sue on November 29, 2011. Plaintiff timely filed the present action.

II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

[2] There is some disagreement in the briefing as to whether this meeting occurred in August or September 2012. *See* Docket No. 47-4, ¶ 8. However, whether the meeting occurred a month prior to the plaintiff's termination as Chester contends or on the same day as plaintiff's discharge as defendant contends is immaterial to the outcome of the Court's analysis. The Court will refer to the meeting as the September 2012 meeting.

Civ. P. 56(a). A party seeking to avoid summary judgment must identify admissible evidence in the record showing a fact dispute. *Id.* at 56(c)(1). "Once a summary judgment motion is made and properly supported, the nonmovant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. Neither conclusory allegations nor unsubstantiated assertions will satisfy the nonmovant's burden." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) (citations and quotation marks omitted).

The Court views the evidence and draws reasonable inferences in the light most favorable to the nonmovant. *Maddox v. Townsend and Sons, Inc.*, 639 F.3d 214, 216 (5th Cir. 2011). But the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), *as revised on denial of reh'g*, 70 F.3d 26 (5th Cir. 1995).

III. Discussion

In order to show age discrimination, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." *Moss v. BMC Software*, 610 F.3d 917, 922 (5th Cir. 2010) (external citation omitted). To establish a prima facie case of age discrimination, a plaintiff must show: (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class when he was discharged; and (4) he was replaced by someone outside of the protected class, substantially younger, or otherwise discharged due to his age. *Jackson v. Cal-Western Packaging Corp.*, 602 F. 3d 374, 378 (5th Cir. 2010). If the plaintiff sets forth a prima facie case, the burden shifts to the defendant to offer a non-discriminatory, legitimate reason for the employment action. *Moss*, 610 F.3d at 922. If the defendant provides a non-discriminatory explanation, then the plaintiff must rebut the defendant's explanation and demonstrate that the offered reason is purely pretextual.[3] *Id.*

In the instant case, there is no disagreement that plaintiff satisfies the first three elements.

However, the parties disagree as to whether plaintiff can demonstrate the fourth element to establish a prima facie case. To satisfy this element, plaintiff must show that he was replaced by someone outside of the protected class, replaced by someone substantially younger, or otherwise discharged because of his age.

Plaintiff's argues that he was discharged because of his age and that other younger field supervisors who also had problematic SOS numbers were not discharged. Specifically, plaintiff points to another field supervisor, Allen Prestridge, who was under 40 years of age years of age and had similar issues with his SOS numbers, but was not discharged at the same time as plaintiff. Both plaintiff and Prestige received written disciplinary action in March 2012 and July 2012 due to their poor performance numbers.

Defendant refutes any argument that the basis of Chester's termination was due to his age. Instead, it asserts Chester was discharged based on the worsening SOS statistics, repeated disciplinary action, and lack of knowledge of his team. Specifically, the breaking point that led to plaintiff's termination occurred at a meeting in September 2012. At this meeting, Chester was asked to identify the best and poor performers on his team. Defendant asserts that plaintiff was unable to accurately identify the best and worst performers on his team.

Chester disagrees with this assertion. In his deposition, plaintiff testified that his responses were accurate and credits the mistake to the possibility that defendant was looking at

[3] In 2009, the Supreme Court held that the ADEA did not authorize a mixed-motives analysis. *Gross v. FBL Financial Servs.*, 557 U.S. 167, 175 (2009). Thus, to prevail on an age discrimination claim, a plaintiff must show that his age was the but for cause of the termination. *Id.* at 180. *See also Hoffman v. Baylor Health Care Sys.*, 597 F. App'x 231, 235 n.12 (5th Cir. 2015).

different performance metrics than he was in formulating his responses. Docket No. 43-1, at 31. However, plaintiff also testified that he did not attempt to correct the miscommunication or clarify his responses even after he was informed he answered incorrectly and his termination was at least in part based on his responses. Docket No. 43-1, at 33.

Further, in his brief, plaintiff contends he can establish the fourth element by showing he did not commit the alleged violation—in this case—that he answered the questions correctly. There are two problems with plaintiff's argument. First, even if plaintiff's answers were the result of a miscommunication, there was a documented record of disciplinary issues and he was given a final warning in July 2012. Plaintiff's SOS numbers continued to worsen from July to September. Docket Nos. 43-5 and 43-6.

Second, plaintiff failed to introduce any evidence demonstrating that he answered correctly the questions regarding his team members. In his declaration he stated, "I identified the good and poor performers based on the SOS numbers that Defendant used in the past to determine how my team was performing. These numbers are broken down by individual team member so I can determine who is meeting goals and who is not." Docket No. 47-4, ¶ 10. However, plaintiff fails to specify which month's numbers he relied upon in his answers to demonstrate that his answers could be construed as correct. Furthermore, he did not seek any clarification or to explain his responses during the meeting or even when he was being terminated. "Plaintiff can show the fourth prong by testifying that he answered the questions correctly in the September 2012, [sic] interview." Docket No. 48, at 4. However, plaintiff cannot survive summary judgment by alluding to what he would testify to at trial without providing specific evidence. *See McCallum Highlands, Ltd.*, 66 F.3d at 92.

Additionally, defendant also points to the fact that it promoted him at the age of 56 shortly after defendant acquired plaintiff's previous employer. Docket No. 44, at 10. In support of this argument, defendant points to Fifth Circuit precedent that states that it is irrational for an employer to show animus in termination but not in hiring. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). Here, defendant hired and promoted him while he was in the protected class; therefore, without some specific evidence to the contrary, plaintiff cannot show defendant's animus.

Quite simply, plaintiff fails to put forth any evidence--either direct or circumstantial--that demonstrates his age was the but for cause of his termination. His complaint, declaration, and even deposition testimony lack any specific allegations that support his age discrimination claim. For instance, when asked what facts supported his conclusion that he was discharged due to his age, he responded, "[w]ell the only fact I have is that I was the oldest one there and I was terminated and then the person that was hired to replace me was younger." Docket No. 43-1, at 40. As his testimony continues, plaintiff further states he cannot be certain that the younger field supervisor was hired to replace him because he does not know when he was hired and two additional field supervisors were also terminated after plaintiff. *Id.* at 40-41. Although plaintiff identified Branning as the person who intentionally fired him due to his age and health issues, he further testified that he did not know whether Branning had any knowledge of his health issues. *Id.* at 42-43. In sum, Chester has failed to demonstrate a genuine issue of material fact that would establish age was the but for cause of his discharge.

The Court will briefly address plaintiff's argument that Prestridge is a comparator who had similar disciplinary history, but was not terminated. Chester and Prestridge both received written disciplinary action based on their performance metrics in March and July. However, according to McKelvaine's declaration, Prestridge correctly answered questions regarding his team's performance at the September meeting. Docket No. 43-3, ¶ 14. In addition, Prestridge did not have any disciplinary action related to unprofessional conduct similar to the incident involving plaintiff and the office administrator. It is also worth noting that Prestridge was discharged in December 2012 because his performance numbers were not improving and he had failed to take necessary corrective action. Docket No. 51-3. Thus, although there were similarities between plaintiff and Prestridge, there are critical distinctions that do not support plaintiff's argument.

A plaintiff cannot survive summary judgment based solely on conclusory allegations [and] unsubstantiated assertions." *Wallace*, 80 F.3d at 1047 (citations and quotation marks omitted). There is no evidence before the Court that shows plaintiff was treated differently than younger, similarly-situated employees or that the defendant discharged him because of his age. Although plaintiff submitted a declaration, it did not include any specific facts that would allow the Court to conclude his age was the but for cause of his termination. Since plaintiff failed to demonstrate the fourth element, he has not established a prima facie case. Therefore, the burden does not shift to defendant and the Court's analysis is complete.

Conclusion

Accordingly, defendant's motion for summary judgment is granted. A Final Judgment in accordance with this Order will be entered on this day.

SO ORDERED, this the 22nd day of July, 2016.

s/ Carlton W. Reeves
UNITED STATES DISTRICT JUDGE